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IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Robert Davis and O. A. Dodson,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Plaintiffs in error on this appeal attack the order of Court denying their motion in arrest of judgment, wherein the sufficiency of the indictment to support the verdict of the jury is assailed. The said indictment is set forth in transcript page 6.

The sole question for the consideration of the court is, does the indictment state a public offense under the existing laws of the United States? We think it does. Section 37 of the Federal Penal Code, under which the same is drawn, reads as follows:

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The true test of the sufficiency of an indictment is not whether it might probably have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Cochran v. United States, 157 U. S. 286;
Daniels v. United States, 196 Fed. 459;
Armour Packing Co. v. United States, 209 U. S. 83;
Jones v. United States, 179 Fed. 584;
Bettman v. United States, 224 Fed. 819, 826.

Furthermore, defects in an indictment must be such as will prejudice the accused in order to render the indictment bad.

Jones v. United States, 162 Fed. 417.

It is not necessary to be so particular in the allegations of an indictment as to entrap the Government into allegations it cannot prove. The essential elements of an offense set out is all that is required.

Evans v. United States, 153 U. S. 584;
Nayes v. United States, 179 Fed. 613.

In N. Y. C. R. R. Co. v. U. S., 212 U. S. at page 497, the court said:

> "Objections were made to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Sec. 1025 of the Revised Statutes of the United States provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed there can be no reversal.
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> Connors v. U. S., 158 U. S. 408;
> Armour Packing Co. v. U. S., 209 U. S. 56.
>
> An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense."

In Potter v. U. S., 155 U. S. 442, an indictment charging unlawful certification of a check was held

sufficient although it did not allege delivery, the court holding that,

> "It would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him always to use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge."

In the case of Smith v. United States, reported in 157 Fed. 721, the indictment charged the defendant with conspiring to injure * * * John Reed in the free exercise and enjoyment of freedom from involuntary servitude and slavery. The Indictment was attacked for insufficiency. On page 726, the court says:

> "It is said that the failure to aver that John Reed was not to be subjected to involuntary servitude as a punishment for a crime, is fatal to the indictment. This is untenable. The ingredients of the offense were susceptible of accurate and clear description without regard to the exception; and they were so described. * * * The exception in question is defensive in its character, and if the defendants fell within its protection, it was an easy matter for them to show it, and it was their duty to do so."

This case was affirmed by the Supreme Court, 208 U. S. 618.

United States v. Cook, 17 Wall. 168;

Ledbetter v. United States, 170 U. S. 606;

Shelp v. United States, 81 Fed. 694;

United States v. Simpson (D. C.), 257 Fed. 869;

Breitmayer v. United States, 249 Fed. 929;

United States v. Oregon Short Line, 169 Fed. 528;

Joplin Mercantile Co. v. United States, 213 Fed. 926, 933;

(Affirmed 236 U. S. 531.)

Rothman *et al.* v. United States, 270 Fed. 31.

"Further, no demurrer was filed or motion to quash made or objection to the indictment effectively taken, until by motion in arrest after verdict. In such case, nothing less than substantial failure in substance in the indictment can avail defendant. Formal or artificial insufficiencies are waived. Dunbar v. U. S., 156 U. S. 185, 191, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. U. S., 161 U. S. 29, 34, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Tyomies Pub. Co. v. U. S. (C. C. A. 6), 211 Fed. 385, 389, 128 C. C. A. 47."

Ulmer v. United States, 219 Fed. 643.

As no challenge was made of the indictment prior to the trial, and the question was only raised by motion in arrest of judgment, and as, further, that which was intended was obvious, it is fair to rule that any

merely technical defect in this indictment was cured by the verdict.

Westmoreland v. United States, 155 U. S. 546;
Dunbar v. United States, 156 U. S. 185.

> "We have heretofore expressed our disapproval of the practice of postponing a challenge to the sufficiency of the indictment until after an expensive trial has been had. * * * A better practice is to raise such question by demurrer in advance of trial."

Clemons v. United States, 149 Fed. 305, 315;
Morris v. United States, 168 Fed. 683;
Ackley v. United States, 200 Fed. 223.

In construing section 37 of the Federal Penal Code, in the case of Aczel v. United States, reported in 232 Fed. 652, the court says:

> "Under the adjudicated cases, it seems well settled that in an indictment for conspiracy to do an unlawful act, the unlawful act which is the object of the conspiracy is not required to be set forth in such particularity as in the case of a prosecution for commission of the substantive offense."

Again, in Williamson v. United States, reported in 207 U. S. 425, the indictment charged a conspiracy to commit subordination of perjury to the objection that the indictment did not set out with technical precision the elements essential to the commission of the crime of subordination of perjury, the court said, at page 447:

> "But in a charge of conspiracy, the conspiracy is the gist of the crime, and certainly to a common intent, * * * sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

In Ching v. United States, reported in 118 Fed. 538, the court referred to an indictment for conspiracy to commit an offense, and said:

> "In such cases, the offense which is intended to be committed as the result of the conspiracy, need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime."

United States v. Cahill, reported in 9 Fed. 80, involves an indictment for unlawfully preventing a qualified voter from exercising the right to vote. The person whose vote was refused is described as a "qualified voter." No specific qualifications were enumerated. The court said:

> "While it may be conceded that where a person offering to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent upon his legal qualifications, he should set out the facts on which his qualifications rests, yet that rule does not apply where, as in this case, the defendant is not the voter, but the defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve upon the United States at the trial to show affirmatively that Batton

> was a legally qualified voter; * * * but the detailed facts on which his qualification depends need not be averred in the indictment."

The law relative to the substantive offense against the United States, which the indictment alleges plaintiffs in error conspired to commit, is the National Prohibition Act. Section 3 of said act, provides as follows:

> "Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor; provided; that nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

Section 6 of the said National Prohibition Act reads as follows:

> "Sec. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do * * * ."

Section 32 of the said National Prohibition Act reads as follows:

> "Sec. 32. * * * It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, * * *"

It will be observed that in an indictment for a direct violation of said act, it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, and need not include any defensive negative averments, but shall be sufficient to state that the act complained of was then and there prohibited and unlawful.

The main question now before this court in this appeal was heretofore decided in this Circuit on May 17, 1920, in case No. 3388, Hockett *et al.* v. United States, 265 Fed. 588.

> "The judgment should not be reversed on account of a criticism so obviously technical and unsubstantial."
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> Grant v. United States, 268 Fed. 443, 445;
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> Grandi v. United States, 262 Fed. 123;

U. S. Comp. Stat. (1916), Sec. 1691;
Judicial Code, Sec. 269, as amended February 26, 1919 (40 Stat. 1181, c. 48);
West v. United States (C. C. A. 6), 258 Fed. 413, 415, 169 C. C. A. 429;
Grandi v. United States (C. C. A. 6), 262 Fed. 123, 124.

Respectfully submitted for the consideration of the court,

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